



Signed and Filed: October 22, 2009

A handwritten signature in dark ink, appearing to read "T. E. Carlson", is written over a horizontal line.

THOMAS E. CARLSON  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re	)	Case No. 09-32268 TEC
	)	
FELY LAZARO SMIRNOFF,	)	Chapter 11
aka FELY SANTIAGO,	)	
	)	
	)	
	)	
	)	
Debtor.	)	

MEMORANDUM RE RELIEF FROM STAY

On October 5, 2009, the court held a preliminary hearing regarding the motion for relief from stay brought by secured creditor First Federal Bank of California (Creditor) regarding the real property known as 455-457 Potrero Avenue, San Francisco, California (the Property). Marc Voisenat appeared for Debtor. Edward S. Kim appeared for Creditor. The court announced at the hearing that it would require Debtor to file a written response to the motion, and it would hold a continued hearing. Upon further consideration, the court determines that relief from stay should be granted immediately.

The Property is a three-unit residential building that is used

MEMORANDUM RE RELIEF FROM STAY

1 by Debtor solely for the generation of income. Debtor's counsel  
2 acknowledged at the hearing that Debtor has no equity in the  
3 Property, as the amount due Creditor greatly exceeds the value of  
4 the Property. That being the case, relief from stay must be  
5 granted unless the Property is necessary to an effective  
6 reorganization. 11 U.S.C. § 362(d)(2). Debtor's counsel stated  
7 that the Property was essential to an effective reorganization for  
8 the following reasons: (1) Creditor's lien can be reduced to the  
9 value of the property under section 506, because the Property is  
10 not Debtor's residence; and (2) Debtor can propose a plan that will  
11 pay Creditor's allowed secured claim in full with interest over  
12 time from expected rental income, and still leave Debtor with a  
13 positive cash flow to use to pay other creditors.

14 I determine that the Property is not necessary to an effective  
15 reorganization, and that relief from stay should therefore be  
16 granted, for the following reasons.

17 First, Debtor does not use the Property in the operation of a  
18 business. The Property is not a plant, store, office, or warehouse  
19 essential to the operation of a larger enterprise. It is simply  
20 residential real property from which Debtor hopes to earn net  
21 rental income.

22 Second, the court has serious questions as to whether Debtor  
23 could ever have any significant positive cash flow, if the Property  
24 is valued correctly accurately, and if the interest rate on the  
25 secured claim is determined correctly. The Property is income-  
26 producing property and will be valued primarily on the basis of its  
27 expected net operating income. The higher the income, the higher  
28 the value of the Property. The debt service that Debtor must pay

1 from the net operating income is a function of the amount of the  
2 debt, the length of the amortization, and the interest rate. The  
3 debt service Debtor will have to pay will be very high relative to  
4 the net operating income for two reasons: (1) Debtor's scenario  
5 necessarily contemplates a loan-to-value ratio of 100 percent; and  
6 (2) the court would have to require Debtor to pay a relatively high  
7 rate of interest, and could not permit Debtor to fix an unusually  
8 long amortization period, because of the high loan-to-value ratio  
9 and Debtor's poor history of payment. Thus, it appears unlikely  
10 that the net operating income is likely to be substantially in  
11 excess of what this Debtor would have to pay to service a loan  
12 equal to 100 percent of the current fair market value of the  
13 Property.

14 Third, it is extremely unlikely that Debtor could confirm a  
15 plan under which he retained the Property. Debtor states that the  
16 fair market value of the property is \$450,000 and that the amount  
17 due under the deed of trust held by Creditor is \$770,000. If  
18 Debtor did succeed in reducing Creditor's secured claim to  
19 \$450,000, Creditor would have an unsecured deficiency claim of  
20 \$320,000. Section 1111(b). Debtor can confirm a plan under which  
21 he retains the Property, only if each class of unsecured creditors  
22 is paid in full (impossible here) or votes to accept the plan.  
23 Section 1129(b)(2)(B). Any unsecured creditor holding one-third of  
24 the allowed unsecured claims within a given class can block  
25 acceptance of the plan by that class. Section 1126(c). Debtor's  
26 scheduled unsecured claims total \$92,500. Creditor could use its  
27 unsecured deficiency claim to block acceptance of any plan under  
28 which Debtor retained the Property.

1       The only way in which denial of relief from stay could  
2 legitimately further reorganization is to prevent the Creditor's  
3 deficiency claim from being asserted against other assets of the  
4 estate. The court has prevented that by granting relief from stay  
5 to permit non-judicial foreclosure, under which there will be no  
6 deficiency claim.

7       Cause exists to grant relief from stay.

8                   **\*\*END OF MEMORANDUM\*\***

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